UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

PRO LABOR II, INC./ACECO, LLC

Employers

and **Case 05-RC-149858**

CONSTRUCTION AND MASTER LABORERS' LOCAL UNION NO. 11, affiliated with LABORERS' INTERNATIONAL UNION OF NORTH AMERICA[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), as amended, a hearing was held on April 20, 2015 before a hearing officer of the National Labor Relations Board ("the Board"). The Construction and Master Laborers' Local Union 11, affiliated with Laborers' International Union of North America ("Petitioner") filed the petition seeking to represent a unit of employees jointly employed by Pro Labor II, Inc. ("Pro Labor") and ACECO, LLC ("ACECO"), comprised of "all full-time and regular part-time construction laborers, including demolition and asbestos removal workers, but excluding office clericals, professionals, confidential and management employees, guards, and supervisors as defined by the Act." The parties agreed that as of the payroll period ending April 12, 2015, there were nine employees in the petitioned-for unit. The parties also stipulated that the petitioned-for

[1] The name of Petitioner was amended at the hearing by stipulation of the parties.

employees work exclusively at the International Monetary Fund facility currently located at 700 19th Street, N.W., Washington, D.C. ("the IMF site").

The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act, that Pro Labor and ACECO are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act,[2] and that all parties are therefore subject to the jurisdiction of the Board.

I. ISSUES AND POSITIONS OF THE PARTIES

There were three issues presented at the hearing: (1) whether the employees in the petitioned-for unit are temporary employees; (2) whether Pro Labor and ACECO are joint employers of the petitioned-for unit of employees; and (3) whether the petitioned-for unit is an appropriate unit.

Petitioner's position is that the employees in the petitioned-for unit are not temporary employees because the work at the IMF site is of indefinite duration and because the contract between Pro Labor and ACECO prohibits ACECO from hiring Pro Labor's employees within six months of the termination of the work, indicating that Pro Labor expects to use these same employees again. On the second issue, Petitioner argues that Pro Labor and ACECO are joint employers because ACECO supervises the Pro Labor employees at the IMF site on a daily basis

[2] The parties stipulated, and I find, that at all material times, Pro Labor has been a corporation, with an office and place of business in Alexandria, Virginia and has been engaged in business as a staffing agency that provides labor on a temporary basis to construction-related companies in Maryland, Washington, D.C., and Virginia, including at the IMF site described above. Based on a projection since about February 17, 2015, at which time Pro Labor commenced its operations at the IMF site, Pro Labor will annually perform services valued in excess of $50,000 in States other than the State of Virginia. The parties also stipulated, and I find, that at all material times, ACECO has been a limited liability company with an office and place of business in Silver Spring, Maryland and has been engaged in the business of providing demolition, environmental remediation and renovation services to private and governmental entities in Maryland, Washington, D.C., and Virginia, including at the IMF site. In conducting its operations during the 12-month period ending April 1, 2015, ACECO performed services valued in excess of $50,000 in States other than the State of Maryland.

and provides safety equipment to the employees, and because the Pro Labor employees work alongside the ACECO employees. Petitioner claims this Region's decision in *Bergman Brothers Staffing, Inc.*, Case 05-RC-105509 (June 20, 2013),[3] presented a similar situation and thus supports a finding of joint employment in this case. Finally, Petitioner argues that the petitioned-for unit is appropriate and the only appropriate unit under *Greenhoot, Inc.*, 205 NLRB 250 (1973) and that nevertheless ACECO failed to show that the larger unit had an overwhelming community of interest with the petitioned-for unit, as required by Board law.

ACECO's position is that the employees in the petitioned-for unit are temporary employees because they are informed of a specific time period for each job upon their hiring, and Pro Labor has recalled only a minority of employees for a second job. On the joint employer issue, ACECO argues that it is not a joint employer because there is insufficient evidence in the record to establish that ACECO meaningfully affects matters related to the terms and conditions of the workers' employment with Pro Labor. Regarding supervision, ACECO argues that its onsite supervision of Pro Labor employees is limited and routine, and thus inadequate to render ACECO a joint employer of those employees. Finally, ACECO argues that the petitioned-for unit is not appropriate because there is insufficient evidence showing a community of interest between the Pro Labor employees at the IMF site. ACECO also argues that the bargaining history between Pro Labor and Petitioner establishes the propriety of an area-wide unit and thus renders the petitioned-for unit, confined as it is to the IMF site, inappropriate.

Pro Labor's position is that the employees in the petitioned-for unit are temporary employees because they are employed for one job only and have no substantial expectancy of

[3] On May 6, 2015, the Board, in an unpublished decision, denied the petitioner's request for review of the Decision and Direction of Election that my predecessor issued in *Bergman Brothers*. The petitioner in *Bergman Brothers* is Petitioner in the present case.

future employment with Pro Labor. In support of its position, Pro Labor contends that its employees have "an uncertain tenure" and that it has not recalled for subsequent employment most of the individuals it has employed. Pro Labor argues that temporary employees are considered by the Board to be ineligible to vote in an election for a petitioned-for unit because they do not share a sufficient community of interest with the regular, permanent workforce. Pro Labor took no position with respect to the joint employer issue or the appropriateness of the unit.

Based on the record as a whole, and after careful consideration of the arguments of the parties at hearing and in brief, I find that neither Pro Labor nor ACECO met its burden of establishing that the employees in the petitioned-for unit should be considered ineligible to vote as temporary employees. I also find that Petitioner did not carry its burden of establishing that Pro Labor and ACECO are joint employers of the employees at issue. Nevertheless, I find that a bargaining unit of Pro Labor's employees working at the IMF site is an appropriate unit. Therefore, I direct that an election be held for a bargaining unit consisting of all full-time and regular part-time construction laborers employed by Pro Labor II, Inc. at the International Monetary Fund facility currently located at 700 19th Street, NW, Washington, D.C., including demolition and asbestos removal workers, but excluding office clericals, professionals, confidential and management employees, guards, and supervisors as defined by the Act.

II. FACTS

A. Pro Labor and ACECO

Pro Labor is a staffing agency that provides labor to construction-related companies. Co-owners Al and Kimberly Monroe began the business on June 1, 2014. Since that time, Pro Labor has had around five clients, including ACECO, and has hired approximately 224 employees for different projects. Around 195 of those employees have worked for Pro Labor only once.

Pro Labor's sole witness, co-owner Kimberly Monroe, has no personal knowledge of how Pro Labor recruits its employees or assigns them to jobs. She knows that Pro Labor keeps job applications for at least thirty days, but does not know if Pro Labor keeps them longer or disposes of them after thirty days. She acknowledges that Pro Labor has a database of phone numbers, maintained by Al Monroe and another Pro Labor employee, which is used to contact employees to fill positions. She also knows that Pro Labor has used "mass texts" to notify employees of a job, though does not know the content or context of the texts. Pro Labor does not require its employees to notify it to obtain future work when they are finished working on a job for Pro Labor's clients.

ACECO is a contractor that provides demolition, environmental remediation and renovation services, including asbestos abatement, to private and governmental entities in the greater Washington, D.C. metropolitan area. ACECO is currently providing asbestos abatement services at the IMF site as a subcontractor to Grunley Construction, which is the general contractor for the renovation work at the IMF Site. At the IMF site, ACECO employs eighteen demolition workers, six to eight of which are asbestos workers. In addition to its own employees, ACECO contracted with Pro Labor to provide additional asbestos abatement workers for ACECO's job at the IMF site.

B. Pro Labor and ACECO's Contract for the IMF Site

ACECO and Pro Labor entered into a "Client Services Agreement" ("CSA") on January 29, 2015. The parties developed the CSA together, though Pro Labor has since used the agreement as its default contract with clients when providing staffing services. Under the CSA, Pro Labor has provided around eight or nine asbestos-abatement employees to work at the IMF

site. During the week of April 13-17, no Pro Labor or ACECO employees worked at the site, because construction was shut down for that week for the IMF's spring meetings.

The CSA states that ACECO "is responsible for supervision of Employees AT ALL TIMES while the Employees are performing tasks" for ACECO (emphasis in original). Pro Labor, on the other hand, "is responsible for hiring, disciplinary action, termination, and/or reassignment of all Employees." Under the CSA, Pro Labor is also responsible for the following:

a) Recruiting, hiring, assigning, orienting, reassigning, counseling, disciplining, and discharging the Employees.
b) Making legally-required employment law disclosures (wage hour posters, etc.) to them.
c) Establishing, calculating, and paying their wages and overtime.
d) Exercising human resources supervision of them.
e) Withholding, remitting, and reporting on their payroll taxes and charges for programs that Pro Labor II is legislatively required to provide (including workers' compensation).
f) Maintaining personnel mid payroll records for them.
g) Obtaining and administering I-9 documentation of Employee's right to work in the United States.
h) Paying Employees' wages and providing the benefits that Pro Labor II offers to them.
i) Paying or withholding all required payroll taxes, contributions, and insurance premiums for programs that Pro Labor II is legislatively mandated to provide to Employees as Pro Labor II's employees.
j) Providing workers' compensation benefits or coverage for Employees in amounts at least equal to what is required by law.
k) Fulfilling the employer's obligations for unemployment compensation.
l) Complying with employment laws, as they apply to Pro Labor II.

The CSA also contains a "non-recruitment" clause, which states that ACECO cannot "recruit, solicit, offer, employ, compensate for services or engage in any capacity, any Employee or person who is currently employed or contracted with Pro Labor II or who was employed or

contracted with Pro Labor II within six (6) months after the date of the termination of this Agreement, without first obtaining written permission from the President of Pro Labor II." There is an exception to the restriction for Pro Labor employees who have worked for ACECO over 2,080 hours. In the clause, ACECO acknowledges that the hiring restriction is "reasonable and necessary to protect Pro Labor II's legitimate interests and rights."

The CSA does not contain an expiration date or state the duration of the job at the IMF site. Instead, it states that Pro Labor may terminate the agreement at any time. Though there is no similar right explicitly granted to ACECO, Michael Citren, the President of ACECO, stated that it was his understanding that the CSA was terminable at will by either party.

C. Division of Employment Responsibilities Between Pro Labor and ACECO

In accordance with the CSA, Pro Labor recruits and hires the employees in the petitioned-for unit, and assigns them to the ACECO project at the IMF site. ACECO pays Pro Labor a billing rate for the employees, but Pro Labor establishes and pays the wages of the employees. The record does not indicate what wage rates Pro Labor pays its employees working at the IMF site, nor does the record indicate what ACECO pays its employees at the IMF site. Pro Labor maintains payroll records for the employees, withholds payroll taxes for them, and takes care of the other payroll-related responsibilities listed in the CSA, such as providing workers' compensation and unemployment insurance, among others.

ACECO employs and pays its own asbestos workers at the IMF site, who work alongside the Pro Labor employees and perform the same work. ACECO provides its employees, though not Pro Labor's employees, with information regarding a 401(k) plan and healthcare options available through ACECO. ACECO also requires its employees to undergo drug testing, which it does not require of the Pro Labor employees.

ACECO, not Pro Labor, supervises the asbestos workers at the IMF site. ACECO's employee, Wilmer Tercios, has the job title of supervisor, and he tells the workers what they should do each day, reminds them when it is time for their breaks, and keeps track of their hours. Grunley Construction, however, sets the workers' schedules and hours, telling ACECO when its workers should be at the site to perform the asbestos-abatement services. ACECO does not have discretion to deviate from the schedule and work hours that Grunley Construction sets, though ACECO does determine the amount of workers it uses to comply with the set schedule.

ACECO does not discipline the Pro Labor workers. It has, however, requested that Pro Labor no longer send certain workers to the IMF site due to performance issues. After the workers' removal, ACECO was no longer involved in their employment; it did not request their discipline or discharge, or otherwise influence what Pro Labor did with those employees after they were removed from the IMF site. In fact, there is no evidence in the record as to what happened to the employees after Pro Labor removed them from the IMF site, including whether they are still employed by Pro Labor at another jobsite.

Pro Labor employees either have or are provided by Pro Labor the necessary safety equipment to work at the IMF site, including hardhats, safety vests, and respirators. ACECO provides some disposable safety equipment for the Pro Labor workers. Specifically, ACECO provides replacement filters for the workers' respirators and Tyvek suits, which are disposable all-white suits that completely cover the asbestos workers. Pro Labor provides its employees with respirators; there is no evidence addressing whether Pro Labor also provides its employees with the requisite safety vests and hardhats, or whether they bring their own. ACECO provides its employees at the IMF site with hardhats and safety vests. The record indicates that Petitioner trains the employees on handling asbestos and assists in employees obtaining licenses for

asbestos work; Pro Labor does not train the employees on handling asbestos. According to ACECO's President, Michael Citren, individuals performing asbestos abatement in Washington, D.C. needs to be trained and licensed in that type of work.

Neither Pro Labor nor ACECO know when the job at the IMF site will end. According to Citren, there is a substantial amount of asbestos abatement work to be performed at the IMF site, potentially many months or even years. ACECO has not made any commitment to Pro Labor about the duration of the work. Citren explained that Pro Labor is a new company and ACECO is trying Pro Labor out to see if it can provide an adequate workforce to fit ACECO's needs. Accordingly, Pro Labor's asbestos workers have not been told how long they will work at the IMF site.[4]

III. ANALYSIS

As explained below, I conclude that: (1) the employees are not temporary employees excluded from voting on representation by the petitioned-for unit; (2) there is insufficient evidence to prove that Pro Labor and ACECO are joint employers; and (3) the unit of Pro Labor employees working at the IMF site is an appropriate unit.

[4] Pro Labor's co-owner, Kimberly Monroe, testified that she overheard Al Monroe (the other co-owner of Pro Labor) state on the phone to Pro Labor's workers that the job would last "a few months." Petitioner's witness, Alexis David (a Pro Labor worker at the IMF site) directly contradicts Ms. Monroe's testimony by stating nobody told him how long he would be working at the IMF site. I find that the record evidence does not establish that Pro Labor's employees were told a specific duration for the work at the IMF site. First, Alexis David testified about his personal knowledge, whereas Kimberly Monroe testified about a conversation she overheard. Second, without addressing whether Ms. Monroe's testimony constitutes hearsay, it is nevertheless foundationally weak, as she did not explain the context of the call or how she knew to whom Mr. Monroe was speaking on the phone. Third, Mr. Citren's testimony, which is that ACECO has made no commitment to Pro Labor regarding the duration of the project and that "it's still all very much up in the air" undermines the contention that Pro Labor told its workers there was a set duration to the project at the IMF site.

A. The Employees Are Not Temporary Employees Excluded from Voting on Representation by the Petitioned-For Unit

The employees in the petitioned-for unit are not temporary employees that should be excluded from voting in a representation election. Under Board law, temporary employees are ineligible to join bargaining units of full and part-time employees. *See Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982). In such cases, the Board "focuses on the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees sufficient to qualify as an eligible voter." *Marian Medical Center*, 339 NLRB 127, 128 (2003). Thus, where all the employees of a petitioned-for unit have the same "temporary" or intermittent schedule, and the employer does not argue that they do not share a community of interest with one another, then they should not be excluded as ineligible voters. *See Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, at slip op. 1 (2010). To find otherwise would be to find that "temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act." *Id*.

Here, the employees of the petitioned-for unit are all the Pro Labor employees working at the IMF site on ACECO's project for asbestos abatement. The unit does not include any other employees that could potentially destroy the community of interest, such as ACECO-only employees or Pro Labor employees working for other contractors. As discussed below in Subsection C, the Pro Labor employees working at the IMF site share a community of interest, and neither Pro Labor nor ACECO adequately show otherwise. The employers' arguments that the employees are temporary because they are hired for one job only are irrelevant where all employees of the petitioned-for unit are in the same position regarding their expectations of continued employment with their employer. *See id.* Thus, because the only employees that are

sought to be included in the petitioned-for unit are the Pro Labor employees working on ACECO's project at the IMF site, and these employees share a community of interest, the employees should not be excluded from exercising their Section 7 rights to choose a representative for purposes of collective bargaining.

Moreover, the tenure of the employees at issue is too uncertain to qualify them as temporary and thus exclude them from the petitioned-for unit. When determining whether an employee is a temporary employee ineligible to be included in a proposed bargaining unit, "[t]he critical inquiry is whether the employee's tenure of employment remains uncertain." *Marian Medical Center*, 339 NLRB at 128. A party alleging temporary status must prove that "the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired." *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). Employees that have been contracted for projects with uncertain end-dates therefore do not qualify as temporary employees. *See Horizon House 1, Inc.*, 151 NLRB 766, 767 (1965) (finding that employees hired for single construction project not temporary where project had no definite end-date and was far from completed, and thus there was "no likelihood that the work of the employees in question will, even under the Employer's position, be terminated in the immediately foreseeable future."); *Textile Workers Union of America*, 138 NLRB 269, 269 n.3 (1962) (finding organizers employed for the duration of specific projects that extended from several months to several years, with the date of termination uncertain, not to be temporary employees); *Personal Products Corp.*, 114 NLRB 959, 960 (1955) (finding employee hired as an electrician on a temporary basis for an indefinite period until the employer could hire a full-time electrician not to be a

temporary employee because on the eligibility date the tenure of his employment remained uncertain).

Here, the employees might not be considered temporary because they have an uncertain tenure working at the IMF site. Neither employer witness testified to a specific end date for the construction work at the IMF site; Citren indicated that it will last "a long time…[m]any, many months, perhaps years." Correspondingly, the CSA covering Pro Labor's work at the IMF site is of an indefinite duration, containing neither an expiration date for the agreement nor an end-date for the project, and there is scant evidence that the Pro Labor employees at the IMF site have been given even a rough estimate of the duration of the work. Thus, as in *Horizon House*, the record evidence here shows that the work for ACECO is far from completed and has no definite end-date for the employees at issue. Under such circumstances, I find that neither Pro Labor nor ACECO met their burden of establishing that the petitioned-for employees are temporary employees under Board law.

B. There Is Insufficient Evidence to Prove that Pro Labor and ACECO Are Joint Employers

On the second issue, I find that Petitioner did not meet its burden of establishing its claim by introducing specific, detailed, and relevant evidence into the record for me to find that ACECO is a joint employer of the Pro Labor workers in the petitioned-for unit. A joint employer relationship exists between two separate business entities that "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation & Warehouse*, 269 NLRB 324, 325 (1984). To establish a joint employment relationship, there must be evidence that one employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction" of the

other employer's employees. *Id.*; *see also AM Property Holding Corp.*, 350 NLRB 998, 999-1000 (2007).

Here, Petitioner failed to establish that ACECO meaningfully affects matters governing the essential terms and conditions of employment of Pro Labor's employees. The evidence indicates that Pro Labor and ACECO are separate business entities, with separate management, that independently establish and pay wages, maintain payroll records, withhold payroll taxes, and take care of other payroll-related responsibilities for their own employees, as outlined in their CSA. ACECO, for example, provides its employees with employee handbooks, 401(k) plans, healthcare options, and safety vests and hardhats, none of which it provides to Pro Labor employees. Nor does it require them to take drug tests, which it requires of its own employees. There is no evidence in the record that either company influences the decisions of the other with respect to such considerations.

Regarding the hiring and assignment of workers, the evidence shows that ACECO is not involved in Pro Labor's decisions on hiring and assignment. Pro Labor recruited and hired the employees in the petitioned-for unit, and assigned them to the IMF site, all without input from ACECO. Indeed, Citren testified that he does not even know the names of the workers Pro Labor assigned to the IMF site, as ACECO requires only that they are properly trained and licensed asbestos workers, but does not pick which workers should be assigned. When the IMF shut down construction at its building for a week, Citren reassigned ACECO's employees to other projects, but does not know what happened to the Pro Labor employees assigned to the IMF site during that time. The evidence on the issue thus demonstrates that neither Pro Labor nor ACECO took part in the hiring or assignment of the other's workforce.

Similarly, there is insufficient evidence that ACECO has influenced Pro Labor with respect to disciplining and discharging employees. The only evidence in the record indicating any influence with respect to such matters is that ACECO asked Pro Labor to have certain workers not return to the site. Such a request, however, is insufficient to qualify ACECO as a joint employer, unless it can be tied to influence over the actual discipline of the employees. *See Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968) (finding employer's requirement that subcontractor's employees observe employer's rules and employer's prerogative to remove subcontractor's employees from its site did not make employer and subcontractor joint employers because such rights were "a natural concomitant of the right of any property owner or occupant to protect his premises."). Yet there is no additional evidence that ACECO requested that Pro Labor discipline or discharge those employees, or take any action other than removing them from the IMF site. In fact, there is no evidence of what Pro Labor did to the workers at all, whether it was to reassign, discipline or discharge them. The only evidence is that ACECO requested their removal from the IMF site, and Pro Labor complied. Such evidence is insufficient to confer joint employer status onto ACECO.

Pro Labor claims that ACECO sets the schedules and dictates the hours for the Pro Labor employees, but Citren's uncontradicted testimony is that the general contractor, Grunley Construction, actually sets both the weekly schedules and the work hours for both ACECO and Pro Labor employees. The only other evidence in the record of ACECO's control over the Pro Labor employees' schedules is from the Petitioner's witness, Pro Labor employee Alexis David, who stated that ACECO's on-site supervisor "tell[s] us the time that we have to leave" and that the workers would tell the supervisor if they wanted to take a break, but that "I already have my time for a break," which is at the same time every shift. There is no other evidence (including in

the CSA) demonstrating that ACECO sets the schedule rather than merely passing along Grunley's schedule to the workers. The evidence is thus insufficient to show that ACECO actually controls the employees' schedules or hours.

There is also insufficient evidence to show that ACECO's onsite supervision is anything more than "limited and routine." The Board has held that evidence of supervision which is "limited and routine" in nature does not support a joint employer finding. *See, e.g.*, *AM Property Holding Corp.,* 350 NLRB at 1001; *G. Wes Limited Co.*, 309 NLRB 225, 226 (1992). Supervision is limited and routine "where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." *AM Property Holding Corp.,* 350 NLRB at 1001.

Here, the record evidence fails to show that ACECO's acknowledged onsite supervision includes showing the Pro Labor employees how to work. On this point, I emphasize the very limited record evidence as to what the asserted "supervision" of the Pro Labor employees at the IMF site actually entails. In fact, the sole employee who testified states only that ACECO's supervisor tells him "what you're going to be doing each day," which falls within the "telling employees what work to perform" type of supervision that the Board finds to be limited and routine.[5] Indeed, that same witness acknowledged that "it's pretty clear what employees are supposed to do to clear the asbestos…from [their] training and [their] experience." The evidence thus not only fails to show that ACECO's supervision goes beyond being limited and routine, but indicates that ACECO's supervisor does not instruct the Pro Labor employees how to do the work because they show up to the IMF site already trained and licensed.

[5] I note that I use the term "supervisor" to describe this individual because that is his job title with ACECO. I am not finding that these supervisors are supervisors under Section 2(11) of the Act.

The Board addressed a similar situation in *G Wes Limited Company*. There, like here, a contractor entered into an agreement with a subcontractor for the subcontractor to provide asbestos workers at a construction site. *G. Wes Limited Co.*, 309 NLRB at 225. There, like here, the two companies maintained separate payroll records, and paid workers' insurance, workers' compensation, and unemployment compensation separately. *Id.* There, like here, the subcontractor made the hiring and firing decisions for its employees, though the contractor would report on-site misconduct to the subcontractor. *Id.* There, like here, the contractor provided onsite day-to-day supervision of the subcontractor's employees. *Id.*

Based on those facts, the Board found no joint employment status. Addressing the contractors' supervision specifically, the Board found the evidence of supervision insufficient to establish a joint employer relationship, explaining as follows:

> The evidence shows that the employees in question were trained and certified asbestos abatement workers. There is no record evidence showing that the supervisors instructed G. Wes employees specifically how to do the work or the manner in which they were to perform the assigned tasks. The limited evidence in the record concerning the supervision of asbestos abatement workers consisted of testimony by the supervisor of another employer's asbestos abatement project, who stated that such workers were told what areas were to be worked and with whom the employees were to work, and the work was then left to the employees to perform.

Id. at 226. Such is the case here, where the employees have already been trained and licensed for asbestos abatement by Petitioner, prior to being assigned to ACECO's construction project; Pro Labor's witness indicated that Pro Labor does not provide training, and she did not know how Pro Labor's employees achieved the required licensure for asbestos work. There is no testimony or documentary evidence that ACECO supervisors instruct the workers on how to perform the asbestos abatement work, or the manner in which they are to perform their tasks. The limited evidence in the record consists of employee Alexis David's testimony discussed above, that the

employees are told what they are going to be doing that day. Thus, as in *G Wes Limited*, the evidence here is insufficient to establish joint employment.

Petitioner cites to this Region's previous decision in *Bergman Brothers*, arguing that the finding of joint employer status there requires the same finding here. *See* Decision and Direction of Election, *Bergman Bros. Staffing, Inc.*, Case 05-RC-105509 (June 20, 2013). However, Petitioner misstates the finding in *Bergman Brothers;* the prior Regional Director did not make a finding of joint employer status in that case. Instead, he explicitly "decline[d] to accept a stipulation from the parties regarding the *absence* of a joint employer relationship between the Employer and its clients," and stated expressly that "I find it unnecessary to conclude whether, in fact, they were joint employers." *Id.* at 7 (emphasis in original). Thus, the analysis of the joint employer issue in that case was limited to refusing to accept a stipulation that two entities *were not* joint employer status; the prior Regional Director never concluded whether the employers at issue were, in fact, joint employers.

Even if my predecessor had so concluded in *Bergman Brothers*, it would not warrant the same conclusion here because the evidentiary records are different. In *Bergman Brothers*, the prior Regional Director noted that "the evidence shows that the particular relationships between the Employer and each of its clients…are consistent with the Employer's joint-employer business model." Here, as explained above, there is insufficient evidence in the record on which I could conclude that the relationship between Pro Labor and ACECO warrants a joint employer finding. The record in this case thus distinguishes it from *Bergman Brothers* and warrants a different finding.

Similarly, my conclusion of joint employer status in *Green JobWorks LLC/Hudak Companies, Inc.* does not require such a finding here. *See* Decision and Direction of Election,

Green JobWorks LLC/Hudak Companies, Inc., Case 05-RC-129659 (June 25, 2014). As a threshold matter, I specifically stated in that decision that my joint employer conclusion was "for the purpose of this decision only," which may be why Petitioner rightly does not cite or rely on it in its brief. *Id*. at 12 n.10. I limited my finding in that case because I dismissed the petition on other grounds, but if the joint employer issue had been relevant to my ultimate decision, then I would have addressed whether the lack of "evidence regarding day-to-day supervision of employees on Hudak Companies jobsites" warranted a finding that "Petitioner had failed to meet its burden of establishing a joint-employer relationship." *Id*. Since I dismissed that petition under *Davey McKee Corporation*, 308 NLRB 839 (1992), however, I did not need to fully assess the sufficiency of the evidence on the joint employer issue. Here, however, where the joint employer issue is relevant to the outcome of the decision, I must undertake the sufficiency-of-evidence analysis I flagged as relevant—though did not fully undertake, as it was unnecessary to the holding in *Green JobWorks*. As explained above, I find, applying that analysis, that Petitioner did not meet its burden of establishing by specific, detailed evidence that ACECO is a joint employer of the Pro Labor employees at the IMF site.[6]

C. The Unit of Pro Labor Employees Working at the IMF Site Is An Appropriate Unit

I find that the petitioned-for unit, modified to include Pro Labor as the sole employer and limited in scope to the IMF site, is an appropriate unit.[7] The parties stipulated at the hearing that the IMF site was the only worksite where the employees assertedly jointly employed by Pro Labor and ACECO worked. I thus tend to view Petitioner as seeking to represent a unit of

[6] Given that my finding is based primarily on the sufficiency of evidence that is in the record, I note that Petitioner, which bore the burden on this issue of proving a joint employer relationship, chose to withdraw its outstanding subpoena of Al Monroe, and concluded that its other subpoenas had been complied with and thus stated there was no need to pursue additional enforcement.

[7] Petitioner indicated at the hearing that it would proceed to an election in any unit I found to be appropriate.

construction laborers employed by Pro Labor at the IMF site. The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Overnite Transp. Co.*, 331 NLRB 662, 663 (2000). The petitioned-for unit does not need to be the *only* appropriate unit, or even the *most* appropriate unit, but merely *an* appropriate unit. *See Overnite Transportation Co.*, 322 NLRB 723, 723 (1996). A single location unit is presumptively appropriate. *See Hegins Corp.*, 255 NLRB 1236, 1236 (1981).

To determine whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a "community of interest." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 14 (2011), citing *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). In determining whether employees in a proposed unit share a community of interest, the Board examines:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. at 9. "[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298, n.7 (1951).

When a petition seeks a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors), and the employees in the group share a community of interest under the traditional criteria, the burden of proof is on the proponent of a larger unit to demonstrate that the additional employees it seeks to

include share an "overwhelming community of interest" with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Odwalla, Inc.* 357 NLRB No. 132, slip op. at 4 (December 9, 2011); *Specialty Healthcare*, supra, slip op. at 11-13 and fn. 28.

An appropriate unit is not rendered inappropriate by the mere fact that its employees share a community of interest with additional employees outside the unit. *Specialty Healthcare*, supra, at slip op. 15 (Aug. 26, 2011). Thus, "demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate." *Id.* Instead, "both the Board and courts of appeals have necessarily required *a heightened showing* to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees." *Id*. (emphasis added). Specifically, the employer must show, using the traditional community-of-interest factors, "that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Id*. at slip op. 17.

Here, I find that a unit of the Pro Labor employees working at the IMF site is an appropriate unit because the employees in it share a community of interest. For one, I find that the unit is a readily identifiable group—it is all of the construction laborers employed by Pro Labor at one particular location, the IMF site. Furthermore, I find that the record evidence is sufficient for me to find that these employees have a community of interest. They are all licensed asbestos-abatement workers that work for Pro Labor on an ACECO project at the IMF site. As discussed above, the Pro Labor employees at the IMF site have limited and routine oversight from ACECO supervisors, thus satisfying for me that the common supervision portion

of the community of interest factors is met. The Pro Labor employees' status at ACECO's IMF site separates them from the other Pro Labor employees (who work for different Pro Labor clients) and from other ACECO employees at the IMF site (who are not employed by Pro Labor and receive different benefits, among other differences). The Pro Labor employees at the IMF site thus share common skills and job duties, a common work site and working conditions, and common supervision. There is no evidence that they have any interchange with any other Pro Labor employees, any functional integration of their work with the work of any other Pro Labor employees, or even any contact with any other Pro Labor employees. I thus find that the Pro Labor employees working at the IMF site share a community of interest and are an appropriate unit.

ACECO argues that Petitioner had the burden to prove that the petitioned-for unit was appropriate and that Petitioner failed to meet its burden. ACECO's argument fails because the evidence is sufficient to show that the unit is appropriate, as discussed above. Moreover, the only evidence ACECO cites in support of its argument addresses whether another unit might be appropriate, not whether the petitioned-for unit lacks a community of interest. ACECO cites, for example, the "extensive bargaining history between [Petitioner] and Pro Labor, establishing an area-wide unit" and the fact that "asbestos remediation employees at IMF have the same job duties as Pro Labor's employees working for other clients" to show that an area-wide unit, rather than a unit of the employees working at the IMF site, is more appropriate. ACECO fails to show, however, any reason why the employees in the petitioned-for unit do not share a community of interest. Given the clear evidence discussed above that the Pro Labor employees at the IMF site share a community of interest, and ACECO's failure to show otherwise, its

contention that the petitioned-for unit is inappropriate fails. *See, e.g., Specialty Healthcare*, supra, at slip op. 15; *Overnite Transportation Co.*, 322 NLRB at 723.

Even construing ACECO's argument to be that the employees in the unit share an overwhelming community of interest with the area-wide unit sufficient to render the smaller unit inappropriate,[8] it still fails because there is insufficient evidence that the employees in an area-wide unit share an overwhelming community of interest. The only evidence in the record regarding Pro Labor employees not working for ACECO is an expired Section 8(f) collective-bargaining agreement between Pro Labor and Petitioner. Given that the Section 8(f) collective-bargaining agreement appears to no longer be in effect, it is unclear if it can show any community of interest at all, but even if it were still in effect, it could only show at most that the covered members shared certain benefits and wages, which is not an overwhelming community of interest. The unit of Pro Labor employees at the IMF site still differs from other Pro Labor employees based on their specific working conditions. The evidence is thus insufficient to show an overwhelming community of interest between the Pro Labor employees working at the IMF site and the other Pro Labor employees; in fact, the evidence suggests clear distinctions between the two groups on several traditional community of interest criteria. Thus, I reject ACECO's argument that the unit of Pro Labor employees at the IMF site is inappropriate.

As Pro Labor is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992).

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[8] ACECO does not make such an argument, instead claiming that the Petitioner had the burden of showing the unit was appropriate and that it failed to meet that burden. Based on that conclusion, ACECO never addresses whether the evidence demonstrated an overwhelming community of interest in the larger area-wide unit and thus satisfied the Board's standard set forth in *Specialty Healthcare*. For purposes of providing a comprehensive decision, however, I will address the hypothetical argument.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Pro Labor II, Inc. has been a corporation, with an office and place of business in Alexandria, Virginia and has been engaged in business as a staffing agency that provides labor on a temporary basis to construction-related companies in Maryland, Washington, D.C., and Virginia, including at the International Monetary Fund facility currently located at 700 19th Street, NW, Washington, DC. Based on a projection since about February 17, 2015, at which time Pro Labor commenced its operations at the IMF facility, Pro Labor II, Inc. will annually perform services valued in excess of $50,000 in States other than the State of Virginia.

3. ACECO, LLC has been a limited liability company with an office and place of business in Silver Spring, Maryland and has been engaged in the business of providing demolition, environmental remediation and renovation services to private and governmental entities in Maryland, Washington, D.C., and Virginia, including at the International Monetary Fund facility currently located at 700 19th Street, NW, Washington, D.C. In conducting its operations during the 12-month period ending April 1, 2015, ACECO, LLC performed services valued in excess of $50,000 in States other than the State of Maryland.

4. Pro Labor II, Inc. and ACECO, LLC are employers as defined in Section 2(2) of the Act and are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

5. Petitioner is a labor organization as defined in Section 2(5) of the Act.

6. A question affecting commerce exists concerning the representation of certain employees of Pro Labor within the meaning of Section 2(6) and (7) of the Act.

7. I find the following employees of Pro Labor constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time construction laborers employed by Pro Labor II, Inc. at the International Monetary Fund facility currently located at 700 19th Street, NW, Washington, D.C., including demolition and asbestos removal workers, but excluding office clericals, professionals, confidential employees, managerial employees, guards, and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Construction and Master Laborers' Local Union 11, affiliated with Laborers' International Union of North America. The date, time, and manner of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes,

who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote are those Pro Labor employees who have been employed for a total of 30 working days or more at the IMF site within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed by Pro Labor for 45 working days or more at the IMF site within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election. To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 South Charles Street, Suite 600, Baltimore, Maryland 21201, on or before June 5, 2015. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Consistent with the Agency's E-Government initiative, parties are encouraged to file an eligibility list electronically. If the eligibility list is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Filing an eligibility list electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the

eligibility list rests exclusively with the sender. A failure to timely file the eligibility list will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so stops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the

request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on June 12, 2015, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[9] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other

[9]A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

Dated: May 29, 2015

/s/ Charles L. Posner

Charles L. Posner, Regional Director
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